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No. 86-736

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

METROPOLITAN TRANSPORTATION AUTHORITY,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether a public entity that (1) does not own, control or operate an electric utility distribution system and (2) is not capable of providing "yardstick competition" to investor-owned utilities is a "public body" under Section 836(b)(1) of the Niagara Redevelopment Act ("NRA"), 16 U.S.C. § 836(b)(1).

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

The Massachusetts Municipal Wholesale Electric Company ("MMWEC") is a public corporation and political subdivision of the Commonwealth of Massachusetts, created pursuant to Mass. Statutes 1975, Chapter 775.

The Connecticut Municipal Electric Energy Cooperative ("CMEEC") is a public corporation and political subdivision of the State of Connecticut, created pursuant to Title 7, Chapter 101a of the General Statutes of Connecticut (1975).

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INTRODUCTION

This brief is filed by the Massachusetts Municipal Wholesale Electric Company ("MMWEC") and the Connecticut Municipal Electric Energy Cooperative ("CMEEC"), intervenors in the proceedings below and respondents before this Court, in opposition to the petition of the Metropolitan Transportation Authority ("MTA") for a writ of certiorari. MMWEC and CMEEC represent the interests of entities which have been found to be NRA "public bodies," and are currently receiving allocations of Niagara Project "preference power."[1] NRA

[1]CMEEC and MMWEC, which are political subdivisions of the states of Connecticut and Massachusetts, respectively, serve as bulk power supply agencies for municipal electric distribution system members. MMWEC is composed of 34 member systems; CMEEC is composed of three member systems, known as "Participants."

Section 835(b)(1), the NRA "preference provision," states in pertinent part that in disposing of 50 percent of the output of the Niagara Project the Power Authority of the State of New York ("PASNY"), the Project licensee, "shall give preference and priority to public bodies and nonprofit cooperatives. . . ."

MTA seeks review of that portion of the judgment of the United States Court of Appeals for the Second Circuit in *Metropolitan Transportation Authority* v. *Federal Energy Regulatory Commission*, 796 F.2d 584 (2d Cir. 1986) (Petition Appendix at A1-A20) which held, affirming the determination of the Federal Energy Regulatory Commission ("FERC"), that only public entities which are capable of selling and distributing power directly to consumers at retail are NRA "public bodies" and qualify for the purchase of NRA preference power. On the basis of this finding, the Commission held that MTA, which is a power consumer and not a retail distributor, was not qualified to purchase NRA preference power.[2] The Second Circuit affirmed the Commission's determination.

MMWEC and CMEEC contend that the petition should be denied. As will be shown below, MTA has not demonstrated any special or important reason for the exercise of the Court's discretion as required under S.Ct. Rule 17.1.[3]

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[2]MTA is of course eligible to purchase power from the half of the Project's output which is not subject to the federal preference provision. Opinion No. 229, 30 FERC ¶61,323 at A67.

[3]MMWEC and CMEEC will not offer a counter to MTA's "Statement Of The Case." However, MMWEC and CMEEC would note that MTA's "Statement," and indeed much of its petition, contain assertions which are in two respects inappropriate. MTA relies, in its Statement and elsewhere, on assertions which are not supported by facts, let alone facts contained in the record in this proceeding. *See, e.g.*, MTA's bald claims as to the size of its "annual electric bill" (Petition at 3), as to the alleged "*immediate* cause and effect impact" between a denial of preference power and pollution due to increased energy consumption (Petition at 22, emphasis in original), and as to the "desirability" on the part of electric utilities to attract new loads (Petition at 17).

MTA's Statement also contains a mischaracterization of a decision of the Federal Power Commission. MTA erroneously argues (Petition

REASONS FOR NOT GRANTING THE WRIT

MTA contends (Petition at 6) that there are "at least four reasons" why a writ of certiorari should be issued. Two of the reasons are "policy-oriented," relating to the potential impact of the decision on Niagara Project allocations as well as other federal project preference sales. MTA claims (Petition at 7) that certiorari should be granted because the decision below may cause "irreparable injury to other government agencies" and may someday result in a conflict between the circuits (Petition at 9). Neither reason supports Supreme Court review of this case because neither is accurate.

The other two reasons relate to the specifics of the Second Circuit's analysis. MTA alleges that the court improperly ignored the "plain meaning" of the NRA, erroneously used (and interpreted) NRA legislative history, and failed to consider certain environmental statutes in reaching its decision. MMWEC and CMEEC will briefly address and refute these erroneous attacks on the Second Circuit's decision.

I. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE SECOND CIRCUIT AND THOSE OF OTHER COURTS OR FEDERAL AGENCIES, AND NO EVIDENCE THAT THE SECOND CIRCUIT'S OPINION WILL RESULT IN "IREPARABLE INJURY" TO OTHER GOVERNMENT AGENCIES

MTA's petition is founded on possibilities and fears rather than on facts. MTA admits (Petition at 9-10) that at present there is no conflict between the Second Circuit's definition of the NRA phrase "public bodies" and the way in

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at 4) that the FPC in *State of Vermont Public Service Board* v. *PASNY*, 55 FPC 1109 (1976), "had given the term 'public bodies' its plain meaning interpretation." In fact, as explained in the portion of FERC Opinion No. 229-A cited by MTA (Petition at 4, citing A28), the FPC in the *State of Vermont* decision interpreted the phrase "public bodies" not simply in accordance with its "plain meaning," but in a way "that was deemed to achieve the purpose of the NRA."

which that term is defined elsewhere. MTA cannot cite so much as a single example of a governmental agency which would suffer any harm, let alone "irreparable injury," if the Second Circuit's determination is upheld. However, MTA contends that certiorari should be granted because: (1) the Second Circuit's allegedly erroneous determination will undoubtedly lead to a conflict at some time in the near future; (2) the issue is one of "first impression;" and (3) pending such a conflict qualified government agencies will likely be denied allocations of federal preference power available under either the NRA or other federal preference laws.

These purported justifications are without merit. This Court need not address a situation where it is conceded that no conflict of any kind, let alone one meriting Supreme Court resolution, is present. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). More importantly, there is little likelihood that there will ever be such a conflict. The decision of the Second Circuit is based upon a proper analysis of the language of the NRA, its extensive legislative history, and interpretations of other federal preference laws. 796 F.2d at 591-593, A11-A16. It is therefore far more likely that the Second Circuit's position will be affirmed rather than rejected in the unlikely event that another circuit is called upon to address this issue.

Moreover, contrary to MTA's assertions, the definition of the term NRA "public bodies," while resolved for the first time by a circuit court in this case, should in fact not be considered an issue of "first impression." The Second Circuit analyzed in detail the meaning of the NRA preference provision in *PASNY* v. *FERC*, 743 F.2d 93 (2d Cir. 1984). While that case did not decide the specific issue faced here, the Second Circuit's analysis in *PASNY*, including an examination of the "agonizingly long" legislative history of the NRA, 743 F.2d at 104, was used by the court in deciding *MTA* v. *FERC*, 796 F.2d at 591-593, A12-A16. In addition, the FERC addressed this issue in both Opinion Nos. 151, 21 FERC ¶61,021 (October 13, 1982), and 151-A, 23 FERC ¶61,031 (April 6, 1983), which were affirmed in *PASNY* v. *FERC*, and Opinion Nos. 229 and 229-A, 30 FERC ¶61,323

(March 27, 1985) and 32 FERC ¶61,194 (July 30, 1985) (Petition Appendix at A23-A85), affirmed in *MTA* v. *FERC*.

Finally, MTA's fears of "irreparable injury" to other government agencies if this decision is not reviewed are unsupported by either facts or law. MTA has offered no instance (outside of itself) where a non-distributor government agency has been or will likely be deprived by the Second Circuit's ruling of power made available pursuant to a federal-type preference clause. More importantly, the court in *MTA* v. *FERC* neither considered nor decided the general legal question raised here by MTA: whether government agencies which consume rather than resell power are eligible to purchase preference power sold pursuant to the terms of federal preference laws. The court resolved only the narrow issue of the meaning of the phrase "public bodies" in the NRA preference clause. It did not determine the result under different statutory provisions contained in the various federal preference laws.[4]

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[4]MTA also asserts (Petition at 8) that the "economic impact" of the Second Circuit's decision is an "important factor" in deciding the fate of MTA's request. While MMWEC and CMEEC do not dispute that the case involves the allocation of a valuable resource, this Court should of course not act where, as here, there has been no demonstration that an error has been made. Moreover, MMWEC and CMEEC would note that the two cases cited by MTA (Petition at 8) in support of the claimed importance of "economic impact" in determining whether to grant the petition do not address this contention. The Court stated in *United States* v. *Standard Oil Co.*, 332 U.S. 301, 302 n.2 (1947), that its acceptance of the case was in part motivated by the presence of numerous similar cases then pending; in *General Motors* v. *District of Columbia*, 380 U.S. 553, 556-57 (1965), which involved review of the District's foreign corporation tax, the Court noted that certiorari was granted because of the feared impact on interstate commerce if the District tax formula was adopted elsewhere, and the view that the District's action involved "statutorily unsupported exertions of administrative power."

II. THE SECOND CIRCUIT HAS CORRECTLY INTERPRETED THE NRA, AND ONLY CONGRESS, NOT THIS COURT, CAN RESOLVE MTA'S CONCERNS

MTA attacks the Second Circuit's analysis of the NRA on the ground that the court improperly ignored the "plain meaning" of the NRA and relied instead upon the intent of the statutory language as expressed in its legislative history. The opinion below fully considers and properly rejects MTA's arguments. MTA has alleged no basis to support revisiting its concerns here.[5]

In addition, MTA contends that even if the Second Circuit is correct that Congress's intent in enacting the NRA preference clause was to promote "yardstick competition," this Court — and not the United States Congress — should interpret away clearly expressed legislative intent. In MTA's view (Petition at 17-18), "'yardstick competition' makes little sense in today's energy market," and this Court should therefore reevaluate the concept in light of MTA's perception of the choice which Congress would make today concerning the allocation of NRA preference power.

MTA is wrong both in proposing that the Court undertake this analysis and in presuming its likely result. It is the exclusive province of Congress, and not this Court, to amend or repeal the NRA. *FPC* v. *Texaco*, 417 U.S. 380, 400 (1974). The Second Circuit correctly found, 796 F.2d at 593, A15, that it had no right to "second guess" Congress's determination,

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[5] Included among MTA's arguments is the claim that the decision does not comport with several environmental laws. The basis for this assertion is the unsupported statement that the loss of preference power (with its *de minimis* impact upon MTA's per ride costs) will have an immediate and significant impact upon the pollution level in New York City. Moreover, MTA's reliance (Petition at 22-23) upon *Forelaws on Board* v. *Johnson*, 743 F.2d 677 (9th Cir. 1984), *cert. denied* _____ U.S. _____, 106 S.Ct. 3293 (1986), is misplaced because that case concerned an agency's environmental obligation when entering into long-term power supply contracts. The action challenged here concerns FERC's interpretation of the statutory eligibility requirements for the purchase of preference power, not the actual allocation of power to qualified entities.

and the cases cited by MTA (Petition at 18), carefully read, do not support the proposition that Congress's will, when known, can be ignored and overridden by judicial "legislation." Moreover, the available evidence, which was presented to the Second Circuit, indicates that Congress continues to believe in the viability of the "yardstick competition" concept. *See* Water Resources Development Act of 1983, Senate Report No. 98-340, 98th Cong., 1st Sess. 53 (1983).

CONCLUSION

For all of the above reasons, the Court should deny the request for a writ of certiorari to the Second Circuit Court of Appeals.

Respectfully submitted,

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